No. 336

In the Supreme Court of the United States

OCTOBER TERM, 1942

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER,

v.

JACKSONVILLE PAPER COMPANY,
RESPONDENT.

BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

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ADDITIONAL STATEMENT OF FACTS

In connection with the statement of facts made by petitioner, we wish to point out that the business done by Jacksonville Paper Company is similar to that of every other wholesaler in the country. It orders merchandise from its suppliers, and when these goods are received, they are unloaded into its warehouses and then as orders come in, the mer-

chandise required to fill them is assembled and delivered by the most convenient means of transportation (R. 373,440).

The quantity of merchandise shipped direct from out-of-state suppliers to customers is insignificant as compared with the total volume of business, i. e., about ½ of 1% (R. 383).

Merchandise specially ordered for particular customers, which includes orders for items not carried in stock (R. 404) is even of less significance, being about 1/40 of 1%, and these orders are handled more as an accommodation to customers than as a part of the usual business (R. 431, 441).

Carload shipments to The Record Press, referred to at page 6 of petitioner's brief, are not received semi-monthly, but about once every two or three months (R. 470, 613). The 3,000,000 ice cream cups ordered for Poinsetta Dairies were usually carried in stock (R. 391) and sold from stock to other customers as well. There was no specific order for Poinsetta Dairies (R. 393). Orders for Florida Growers Press were placed about once a year (R. 618).

BRIEF AND ARGUMENT

It will be noted from the foregoing that the special elements relied on to constitute interstate commerce are an insignificant part of the business done. It is, therefore, apparent that the real question which petitioner seeks to have passed upon by this Court is whether the mere fact that a sub-

stantial amount of the merchandise sold by respondent originates from outside the state constitutes interstate commerce within the meaning of the Fair Labor Standards Act, although the merchandise upon arrival at the warehouse is placed in stock and subsequently sold within the state, as and when orders are received therefor.

We respectfully submit that this Court has already answered the question contrary to the contentions of the petitioner in a number of decisions which control the case at bar, although the statute upon which this action is based was not involved in these cases. We call attention briefly to some of these cases most nearly in point:

C.M.&St.P. v. Iowa, 233 U.S. 334, holds that the receipt of shipments of coal from outside the state at interchange tracks, there held by the consignee until sales were made and re-shipped to points within the state was not a continuous movement and the re-shipment constituted intrastate commerce.

A.C.L. v. Standard Oil Company, 275 U.S. 257, holds that the receipt of large quantities of petroleum products at storage tanks at the port terminates the interstate commerce, although 95% of these products moved beyond the port to points within the State of Florida, much of it pursuant to contracts previously made for annual requirements. The Court in that case remarked:

> "At the time the shipment of the fuel oil is made from the point of origin, plaintiff (Standard Oil Company) cannot say where

> any particular cargo of it or any part thereof will go after it has been pumped into the storage tanks, to whom it will go or when it will be shipped. At the time of shipment from the point of origin, the only destinations which can be given are Port Tampa or Jacksonville, respectively."

So here the only point of destination which can be given at the time of shipment is the warehouse of the respondent at the particular branch to which the merchandise is consigned.

Schechter Poultry Corp. v. U.S., 295 U.S. 495, cites A.C.L. v. Standard Oil Company, supra, and points out that the mere fact that there may be a constant flow of commodities *into* a state does not mean that the flow continues after the property has arrived and is held solely for local disposition and use, distinguishing the cases dealing with a stream of commerce, i.e., where goods come to rest within a state temporarily and later go forward in interstate commerce. See, also, to the same effect:

American Steel & Wire Co. v. Speed, 192 U.S. 500,

General Oil Co. v. Crain, 209 U.S. 211,

Lipson v. Socony Oil Company (2 C.C.A.) 81 F. (2d) 205,

Jewel Tea Co. v. Williams (10 C.C.A.) 118 F. (2d) 202,

Jax Beer Co. v. Redfern (5 C.C.A.) 124 F. (2d) 172,

Swift & Co. v. Wilkerson (5 C.C.A.) 124 F. (2d) 175,

the latter three cases dealing with the applicability of the Fair Labor Standards Act.

There is nothing in the statute evidencing any legislative intent to apply the same to transactions which in themselves would be purely local. Congress well knows how to express its intention in such matters, as evidenced by statutes such as the National Labor Relations Act, and if it had intended to embrace within the scope the Wage and Hour Law transactions which ordinarily would be regarded as being subject to local regulation only, the definition of interstate commerce and the application of the statute only to employees engaged in interstate commerce, or in the production of goods for interstate commerce, would not have been so limited.

Federal Trade Commission v. Bunte, 312 U.S. 384.

If the construction sought by the petitioner is adopted, there can hardly be a business of any kind, no matter how limited in extent, carried on within the boundaries of a particular state which would not be subject to Federal regulation for its merchandise, tools and equipment, which in almost every instance originate from points outside of the state in which the business is carried on, and it is difficult to conceive of any transaction that would not in such event be within the scope of interstate commerce. Clearly such a holding would do away

with the distinction recognized in the Constitution between interstate and local commerce and would nullify the statement of this Court in *National Labor Relations Board v. Jones & Laughlin, 301 U.S. 1*, that:

> "The authority of the federal government may not be pushed to such an extreme as to disregard the distinction which the commerce clause establishes between commerce 'among the several states' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system."

We respectfully submit that the petition for certiorari should be denied.

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